No. 95-157

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-157

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Our position is that, absent direct evidence of a discriminatory purpose, a criminal defendant must make a substantial threshold showing that similarly situated persons of a different race have not been prosecuted in order to obtain discovery from the government on a selective prosecution claim. Respondents offer no adequate reason for eliminating the similarly situated offender requirement.

1. The Martin respondents contend, for the first time in this litigation, that requiring a substantial threshold showing of selective prosecution as a condition to obtaining discovery conflicts with Fed. R. Crim. P. 16(a)(1)(C). Martin Br. 26-38. According

to respondents, Rule 16 requires the government to provide discovery to a defendant so long as "the information already available to a defense attorney is 'sufficient to lead a reasonable person to believe . . . that further inquiry on the subject is warranted.'" Martin Br. 22, quoting Pet. App. 97a (Reinhardt, J., dissenting from the panel opinion in this case). As a general matter, discovery is not available in a criminal case on that slender basis, and respondents' suggestion is particularly unwarranted with respect to discovery incursions into the exercise of prosecutorial discretion.

a. On its face, Rule 16(a)(1)(C) does not give a defendant unrestricted access to the government's files in order to search for a defense to the charges against him. Rather, in authorizing limited discovery in a criminal case, the portion of Rule 16 invoked by respondents specifically requires a defendant to make a threshold showing of materiality:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody, or control of the government, and *which are material to the preparation of the defendant's defense* * * *.

Fed. R. Crim. P. 16(a)(1)(C) (emphasis added).

The Rule's restriction on discovery of documents and tangible items to those that are "material to the preparation of the defendant's defense" is a significant limitation. As one commentator has stated, "[i]f defendant requests discovery because he thinks the

documents sought are material to the preparation of his defense, he must make a prima facie showing of materiality." Charles A. Wright, *Federal Practice And Procedure* § 254, at 66-67 (2d ed. 1982) (footnote omitted). That requirement means that, before discovery may be ordered, the defendant must establish that he has a factual basis for asserting the defense on which discovery is sought, and that the requested documents or tangible items are relevant and helpful to that defense. See *United States* v. *Murdock*, 548 F.2d 599, 600 (5th Cir. 1977). The factual showing of "materiality" is to be demonstrated by the defendant "*before* discovery is allowed." *Ibid.* (emphasis added); cf. *United States* v. *Berrios*, 501 F.2d 1207, 1211-1212 (2d Cir. 1974) (requiring evidentiary showing of "the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements" to obtain enforcement of a subpoena under Fed. R. Crim. P. 17(c) issued in connection with a hearing on a selective prosecution claim).

Because the test under Rule 16 is "materiality," the threshold showing that must be made depends on the defense that is asserted. When information is sought to support a defense of selective prosecution based on race, the defendant must make a threshold showing of race-based selection, *i.e.*, that he was selected for prosecution, while similarly situated persons of a different race were not. *Murdock*, 548 F.2d at 600; *United States* v. *Johnson*, 577 F.2d 1304, 1309 (5th Cir. 1978) (where the defendant "did not make a *prima facie* showing that he was singled out for prosecution, he did not establish the materiality of the evidence sought" and consequently was not entitled to discovery under Rule 16); see also *United*

States v. *One 1985 Mercedes*, 917 F.2d 415, 421 (9th Cir. 1990) (in order to obtain discovery on a claim of vindictive prosecution, defendant must introduce evidence tending to establish the essential elements of the claim). It is not sufficient for defense counsel to assert that the information at hand affords what he claims is a reasonable basis for further inquiry.

The structure of Rule 16 confirms that the "materiality" requirement was intended as a significant limitation on a defendant's right to discovery under that portion of the Rule. Rule 16 specifically permits the defendant to obtain discovery of several other categories of information without requiring the defendant to show that they are material to the defense. The government must disclose the defendant's relevant oral or written statements, Rule 16(a)(1)(A); the defendant's criminal record, Rule 16(a)(1)(B); the results of scientific tests that "are intended for use by the government as evidence in chief at the trial," Rule 16(a)(1)(D); summaries of expert witness testimony that the government intends to use "during its case in chief at trial," Rule 16(a)(1)(E); and, most important, all documents and physical objects that "are intended for use by the government as evidence in chief at the trial" or that "were obtained from or belong to the defendant," Rule 16(a)(1)(C). To the extent, however, that a defendant seeks other documents, tangible objects, or scientific reports in the government's possession, he must show that the documents sought are "material to the preparation of the defendant's defense." Rule 16(a)(1)(C) and (D).[1]

---

[1] The history of Rule 16 also supports that analysis. As adopted in 1966, Rule 16 did not specifically address whether a defendant could obtain evidence that the government would introduce at trial or had obtained from the defendant. Instead, those two categories of information were discoverable only "upon a showing of materiality to the preparation of [the defendant's] defense." Fed. R. Crim. P. 16(b) (1970). In 1975, however, Rule 16(a)(1)(C) was amended for the express purpose of relieving a defendant of having to demonstrate materiality in order to obtain those two categories of information. The Advisory Committee reasoned that evidence introduced by the government in its case in chief or obtained from the defendant could be assumed to be "material" without requiring the defendant affirmatively to establish that fact. Fed. R. Crim. P. 16 advisory committee note (1974 Amendment). For other documents, however, the materiality requirement was left intact.

The Martin respondents contend that, because Rule 16 specifically precludes discovery of three categories of information (internal government documents, witness statements, and grand jury proceedings), interpreting the Rule to require a defendant to establish a threshold showing to obtain information outside those categories would violate the principle of "*expressio[] unius est exclusio alterius*." Martin Br. 27-28. The requirement of a threshold showing, however, does not create a fourth category of information that is categorically shielded from disclosure. Rather it imposes a condition upon obtaining information that may be subject to disclosure, and that condition is drawn directly from the text of Rule 16. The principle of *expressio unius est exclusio alterius* is therefore inapplicable here.

b. The relaxation of discovery standards proposed by respondents is particularly inapt in the present context. The Federal Rules of Criminal Procedure were framed against the backdrop of well-established principles that sharply limit judicial inquiries into

exercises of prosecutorial discretion, and the "materiality" requirement in Rule 16, as applied to such inquiries, necessarily draws its meaning from those principles. Cf. *United States* v. *Mezzanatto*, 115 S. Ct. 797 (1995) (interpreting Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6) against the background principle that evidentiary privileges may be waived). Just as those principles require a substantial threshold showing of unconstitutional motive before a defendant may obtain discovery on a claim that the government has unconstitutionally withheld a substantial assistance motion, *Wade* v. *United States*, 504 U.S. 181, 186-187 (1992), so they require a substantial threshold showing of selective prosecution here. See also *Franks* v. *Delaware*, 438 U.S. 154, 155-156 (1978) (requiring "substantial preliminary showing" as a precondition to a hearing on a claim that a facially valid warrant is invalid because the affiant lied to the magistrate); *Roviaro* v. *United States*, 353 U.S. 53, 60-61 (1957) (requiring a substantial showing of materiality as a precondition to obtaining discovery of information that would disclose the identity of a confidential informant).

The exercise of discretion in enforcing the criminal law is a core element of the constitutional authority of the Executive Branch, and judicial inquiry into such prosecutorial decisionmaking "entails systemic costs of particular concern." *Wayte* v. *United States*, 470 U.S. 598, 607-608 (1985). While respondents' stated "central purpose" is "to obtain from the government an official articulation of its prosecution criteria," Martin Br. 59, this Court recognized the general inappropriateness of forcing precisely that form of disclosure in *Wayte*:

> Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.

470 U.S. at 607. Those concerns "make the courts properly hesitant to examine the decision whether to prosecute." *Id.* at 608. See also *McCleskey* v. *Kemp*, 481 U.S. 279, 296-297 & n.18 (1987) ("the policy considerations behind a prosecutor's traditionally 'wide discretion'" suggest the general "impropriety of our requiring prosecutors to defend their decisions").

Nothing in Rule 16 suggests that the Rule was intended to abrogate those well-established principles and to make judicial inquiries into prosecutorial decisionmaking a routine part of a criminal proceeding. Accordingly, when a defendant invokes Rule 16 to seek discovery to support a claim of selective prosecution, he must make a substantial threshold showing that unconstitutional selective prosecution has occurred.

c. The Martin respondents concede that some threshold showing as to the merits of a proposed defense must be made before discovery under Rule 16(a)(1)(C) may be ordered. They acknowledge that, in the absence of an "objective standard" to determine the "genuineness" of a defense, their construction of Rule 16(a)(1)(C) would result in "the sort of fishing expedition prohibited by criminal and civil discovery principles alike." Martin Br. 21-22. And respondents do not suggest that the text of Rule 16 provides any

further guidance about the kind of threshold showing required. Rather than interpreting the materiality requirement in light of settled limitations on judicial review of exercises of prosecutorial discretion, however, respondents contend that the test for whether the documents relate to a "genuine defense" should be "gauged by the standard of Rule 11" of the Federal Rules of Civil Procedure. Martin Br. 14-15, 22-23. Respondents would find that test to be satisfied when "the information available to defense counsel is sufficient to lead a reasonable attorney to conclude that further inquiry on the subject is warranted." *Id.* at 23.

For three reasons, Rule 11 provides no source of guidance for the interpretation of Rule 16 of the Federal Rules of Criminal Procedure. First, the set of rules to which Rule 11 belongs is expressly limited to "suits of a civil nature." Fed. R. Civ. P. 1. There is therefore no textual basis for applying Rule 11 in the context of a criminal case. Second, Rule 11 applies to pleadings or motions filed with the court, and is expressly made "[i]napplicab[le] to [d]iscovery," see Fed. R. Civ. P. 11(d). It thus provides a particularly unsuitable frame of reference for measuring entitlement to discovery in a criminal case. Third, it is unlikely that any standard included in the Federal Rules of Civil Procedure would be properly suited to measure whether a criminal defendant may compel discovery from the government on a claim of selective prosecution. The Civil Rules establish a very permissive discovery regime. See Fed. R. Civ. P. 26 (requiring voluntary disclosure of much information regarding the case and permitting additional discovery where reasonably calculated to lead to the discovery of admissible evidence). In contrast, because

of the important public policy of expediting the resolution of criminal cases, the Criminal Rules tightly limit the scope of discovery. See U.S. Br. 19 n.1. Given the very significant differences between the purposes and scope of civil and criminal discovery rules, it would be inappropriate to borrow any civil discovery standard to give content to a criminal discovery rule.

Even more significantly, the Martin respondents' proposed standard does not provide any meaningful protection against intrusive and unnecessary inquiries into prosecutorial decisionmaking. The inevitable consequence of adopting a standard that depends on whether a "reasonable ttorney [would] conclude that further inquiry on the subject is warranted" would be to make judicial inquiries into prosecutorial decisions routine in a wide range of cases. As we point out in our petition (Pet. 22 & n.2, 24 & n.4), the standard adopted by the court of appeals in this case has already led to repeated judicial inquiries into claims of selective prosecution in crack and illegal reentry cases. Adoption of respondents' standard, which appears to afford even less protection for prosecutorial decisionmaking, could only accelerate that trend. This Court's cases do not countenance that kind of routine encroachment on prosecutorial authority.[2]

---

[2] Respondent Rozelle contends that, in order to obtain discovery on a claim of selective prosecution, a criminal defendant must establish a "colorable basis" for believing that selective prosecution has occurred. Rozelle Br. 16-17. While courts have often used the phrase "colorable basis" in describing the standard for obtaining discovery on a selective prosecution claim, they have also uniformly held that a defendant must make a threshold showing that similarly situated offenders

2. Respondents next assert (Martin Br. 38-50) that it is unnecessary to make a showing regarding similarly situated offenders who were not prosecuted as a prerequisite to discovery because, in respondents' view, such a showing is not an essential element of a selective prosecution claim at all. Respondents' approach to proving selective prosecution is incorrect. Absent direct evidence of discriminatory motive, evidence that similarly situated offenders have not been prosecuted *is* essential to establish unconstitutional selective prosecution, see U.S. Br. 21-25, 32-35, and evidence of the same character is thus an essential element of a selective prosecution discovery request.

a. The contrast between this Court's decisions in *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), and *Ah Sin* v. *Wittman*, 198 U.S. 500 (1905), reveals the importance to a selective prosecution claim of establishing that similarly situated offenders have not been prosecuted. In *Yick Wo*, the habeas petitioner's

---

have not been prosecuted in order to establish a "colorable basis." See U.S. Br. 22-25. The court below is the first to find a "colorable basis" for discovery without imposing a similarly situated offender requirement. While the label for the test is of limited importance, in our view a clearer description of the proper standard would be to characterize it as a "substantial threshold showing." See *Wade*, 504 U.S. at 186 (noting defendant's concession that a "substantial threshold showing" is required to obtain discovery on a claim that the government has acted unconstitutionally in refusing to file a substantial assistance motion). The critical point, however, is that there must be an evidentiary showing to support the claim of improper prosecutorial conduct, and, in this context, that credible evidence must be produced that similarly situated offenders have not been prosecuted before discovery may be ordered.

showing that similarly situated offenders had not been prosecuted led to a finding of an equal protection violation, while in *Ah Sin*, the habeas petitioner's failure to allege that similarly situated persons had not been prosecuted led to a dismissal of the complaint. See U.S. Br. 32-34. Respondents contend that *Ah Sin* merely reflects an application of "stringent pleading requirement[s]." Martin Br. 43-44. Under modern pleading requirements, the habeas petitioner in *Ah Sin* might not have been required to *allege* that similarly situated offenders had not been prosecuted in order to survive a motion to dismiss. But under the holding of that decision, he still would have been required to *prove* that similarly situated offenders had not been prosecuted in order to prevail on the merits. *Ah Sin*, 198 U.S. at 506-508.

Nothing in *Wayte* rejects the view that a selective prosecution claim depends on a showing that similarly situated offenders were not prosecuted. Martin Br. 42-43. The defendant in *Wayte* was a vocal opponent of the draft who reported his nonregistration to the government. He alleged that the government had impermissibly selected him for prosecution on the basis of his vocal opposition to the draft. The evidence established, however, that the government had a neutral policy of prosecuting those who reported their nonregistration to the government, including those who were not vocal opponents of the draft. In light of that evidence, the Court held that the defendant had failed to establish that he had been selected for prosecution based on his vocal opposition to the draft because "[the] facts demonstrate that the Government treated all reported nonregistrants similarly. It did not subject vocal nonregistrants to any special burden." 470 U.S. at 610.

The Martin respondents' contention (Br. 42-43) that *Wayte* rejected a similarly situated offender requirement is therefore incorrect. The Court ruled against the defendant in that case precisely because he was unable to show that similarly situated offenders were treated any differently from him.[3] *Wayte* therefore provides no support for dispensing at the discovery stage with the threshold showing of discriminatory selection.

b. In support of their contention that a selective prosecution claim does not require proof that similarly situated offenders have not been prosecuted, the Martin respondents rely (Br. 41-42) on cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and this Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Selective prosecution claims, however, raise unique concerns that are not implicated by Title VII or *Batson* claims. An employer may be required to defend a hiring or promotion decision, or a litigant to defend a peremptory challenge, without imposing any of the "systemic costs" (*Wayte*, 470 U.S. at 607) associated with requiring the government to justify to a federal judge the charging decisions it has made in the case at hand and potentially in many other cases. The standards of proof applicable in those settings, therefore, cannot readily be applied to the selective prosecution setting.

---

[3] The dissent in *Wayte* understood the majority to have imposed a similarly situated offender requirement. The dissent stated that "the Court errs in the manner in which it analyzes the merits of the equal protection claim. It simply focuses on the wrong problem when it states that the 'Government treated all reported nonregistrants similarly.'" 470 U.S. at 629-630 (Marshall, J., dissenting).

This Court's decision in *McCleskey* v. *Kemp*, 481 U.S. 279 (1987), makes clear the special proof requirements applicable here. In that case, the Court held that claims that prosecutors have exercised their discretion on the basis of race must be supported by "exceptionally clear proof." *Id.* at 297. For that reason, the Court held that the kind of statistical evidence used to prove discrimination in Title VII and jury venire cases could not be used as a basis for shifting the burden of proof to a prosecutor to justify his discretionary decisions. *Id.* at 293-297. The Court explained that "the policy considerations behind a prosecutor's traditionally wide discretion suggest the impropriety of our requiring prosecutors to defend their decisions * * * often years after they were made." *Id.* at 296 (internal quotation marks omitted). And it noted that "[r]equiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts." *Id.* at 296 n.17 (citing *Batson*). In light of *McCleskey*, respondents' reliance on the procedural framework for proving Title VII and *Batson* claims is misplaced.[4]

In any event, where, as here, a party seeks to raise an inference of discrimination based on a statistic or a pattern, Title VII and *Batson* both require a proper

---

[4] Respondents attempt to distinguish *McCleskey* on the ground that it involved a challenge to decisions made by juries. Martin Br. 52-53. The claim in *McCleskey*, however, was that both juries and prosecutors had exercised their discretion on the basis of race. And the Court's holding that such a claim must be supported by "exceptionally clear proof" (481 U.S. at 297) applied to both the discretionary decisions of juries and the discretionary decisions of prosecutors. *Id.* at 294-297.

comparison pool. In the Title VII context, the Court has made clear that a plaintiff cannot establish a prima facie case of a discriminatory effect or a discriminatory purpose merely by showing that there is a low percentage of minority employees in a particular job. Rather, there must be a comparison "between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs." *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 650 (1989) (discriminatory effect); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 306-308 (1977) (discriminatory intent). Similarly, in the *Batson* context, a prima facie case may not be established based solely on evidence that a litigant exercised preemptory challenges to exclude potential jurors of a particular race. For example, a party who strikes ten black jurors in a row has not committed a prima facie *Batson* violation if all of the prospective jurors on the venire are black. A pattern of striking jurors of a particular race is significant only if the litigant has declined to strike jurors of a different race.

c. The Martin respondents argue that, in a variety of settings, a prosecutor's improper selection of a person for prosecution based solely on his race would be immunized from scrutiny by a requirement that a defendant must identify similarly situated offenders who were not prosecuted. Br. 39-40. They claim, for example, that that result would follow when the defendants are charged with an offense that is committed exclusively by members of one race. *Ibid.* That claim is incorrect. If the defendant in such a hypothetical could produce direct evidence of discriminatory intent, or show that he is similarly situated in all relevant respects to persons who

commit a different offense but are not prosecuted, an Equal Protection violation could be sufficiently indicated (at the discovery stage) or established (on the merits). There is no reason to think that if such unconstitutional action were taking place, defendants would be unable to obtain *some* credible evidence of it —and if no such evidence were available, it would plainly be inappropriate to license a "fishing expedition" for it. Martin Br. 22.

In any event, respondents' claim in this case is not that prosecutors have chosen to prosecute crack offenses *because* they are committed exclusively by members of one race. Rather, their claim is that federal prosecutors have selected black crack offenders for federal prosecution, while leaving white crack offenders to be prosecuted by the State of California. Respondents virtually concede that proof of similarly situated offenders who have not been prosecuted is essential to *that* claim by stating that, "[t]o the extent that a defendant argues that improper invidious distinctions were made within a particular group of offenders, such as crack dealers, the com-parative treatment of other members of that group would of course be important evidence." Martin Br. 44-45.

3. The Martin respondents contend that requiring a showing that similarly situated offenders have not been prosecuted at the discovery stage would impose a "crippling burden of proof" that will allow racial discrimination to escape undetected. Martin Br. 45-50 & n.66. As we note in our opening brief, however, defendants in other cases have satisfied the similarly situated offender requirement at the discovery stage, U.S. Br. 26-27, and if there were any merit to respondents' claim in this case, they should have been able to satisfy that requirement as well.

One of respondents' counsel submitted a conclusory affidavit below asserting that, in his capacity as a member of the Board of Directors of the Los Angeles County Criminal Courts Bar Association Indigent Defense Panel, he regularly conversed with "many state court judges, prosecutors, and defense attorneys." J.A. 141. There is no reason that respondents could not have obtained concrete information from those sources concerning whether persons who were similarly situated to them were prosecuted by the State of California. The Federal Public Defender's Office in this case searched its own records for information concerning cases closed by its office; there is no reason that it could not have conducted a comparable study of cases closed by local public defenders during the same period. Finally, California law generally makes court records available to the public. *Copley Press, Inc.* v. *Superior Court*, 7 Cal. Rptr.2d 841, 843-844 (1992). Respondents were free to review those files for evidence that similarly situated persons were prosecuted in state court.[5] Thus, while the similarly situated offender requirement serves as

[5] Respondents themselves indicate the feasibility of such an inquiry, by referring to the "Berk study," which was not introduced in this case and is not a part of the record here. That study purported to compare the rates at which blacks are prosecuted for crack offenses in state and federal court. Martin Br. 12-13. While Judge Reinhardt relied on that study in his panel dissent, Pet. App. 101a-102a, in our en banc brief, we objected to the propriety of taking judicial notice of such matters, noting that the study had been extensively attacked for its failure, *inter alia*, to compare similarly situated defendants and could not be described as "not subject to reasonable dispute." U.S. En Banc Br. 8 & n.6 (quoting Fed. R. Evid. 201(a) and (b)). The en banc majoriy opinion did not refer to the Berk study.

an effective threshold screening device, it does not block meritorious claims.[6]

The Martin respondents assert that it would have been easier for the government to produce information concerning similarly situated offenders than for the respondents to obtain such information themselves. Martin Br. 46-47. The relative ease of acquiring information bears on the propriety of discovery, however, only after a defendant makes the requisite threshold showing of the defense in question. Because it is generally easier for the government than for criminal defendants to obtain information, any other view would lead to the

[6] It is not our view that "the district judge in this case could properly have issued a subpoena to California officials directing them to produce information about cocaine base dealers prosecuted in state court." Martin Br. 18. A subpoena duces tecum under Fed. R. Crim. P. 17 is "not intended to provide a means of discovery for criminal cases." *United States* v. *Nixon*, 418 U.S. 683, 698 (1974), citing *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 220 (1951). And if respondents were seeking evidence under Rule 17 for use at a hearing relating to a selective prosecution defense, they would be required to make the same threshold showing that similarly situated offenders have not been prosecuted that is required by Rule 16. *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974); see also *United States* v. *Nixon*, 418 U.S. at 698-670 (a party seeking to enforce a Rule 17 subpoena must make a preliminary showing that the materials sought are relevant and admissible); 2 Charles A. Wright, *Federal Practice and Procedure* § 275, at 160 n.8 (2d ed. 1982). The government's statement below that respondents could have pursued subpoenas to obtain state law enforcement records (see Martin Br. 18 n.47) was intended to underscore that respondents had made no independent efforts to obtain the information they sought—not to suggest that such subpoenas could have been enforced over the state's objection.

unacceptable conclusion that a defendant need only allege unconstitutional selective prosecution in order to obtain discovery on that claim.

4. Finally, the Martin respondents argue that the meaning of a similarly situated comparison pool is elusive and that absent discovery, they had no basis for determining the offenders who were "similarly situated" to them. Martin Br. 59. That argument is without merit. Respondents were required to show, at a minimum, that there were offenders not prosecuted who engaged in conduct comparable to the conduct that they were charged with committing. See U.S. Br. 35 n.4. A prosecutor is presumed to act in good faith. See U.S. Br. 18-19, 29-30. Accordingly, when persons not prosecuted have engaged in conduct that is significantly different from those who were prosecuted, the presumption is that the difference in treatment is based on the difference in conduct and not on impermissible considerations such as race. To overcome that presumption, the defendant must make a threshold showing that at least some persons known to the prosecutor have not been prosecuted for engaging in conduct that is sufficiently similar to the conduct that the defendant is charged with committing.

Accordingly, the starting point for respondents was the criminal conduct with which they were charged in the indictment against them. In this case, the indictment against respondents charged them with conspiring to distribute more than 50 grams of cocaine base, and with using guns in furtherance of that conspiracy. J.A. 60-65. Under federal law, both the quantity of drugs and the use of a gun significantly affect the seriousness of a drug trafficking offense. See 21 U.S.C. 841(b)(1) (1988 & Supp. V 1993)

(setting a ten-year minimum for sale of more than 50 grams of cocaine base, and a five-year minimum for sale of more than five grams of cocaine base); 18 U.S.C. 924(c) (1988 & Supp. V 1993) (setting an additional five-year penalty for use of a gun in relation to a drug trafficking offense). To satisfy the similarly situated offender requirement, respondents were therefore required to show that others who were not prosecuted conspired to distribute a comparable amount of cocaine base and used guns in furtherance of that conspiracy. As the panel below correctly concluded (Pet. App 82a-83a), because respondents failed to make that showing, the district court abused its discretion in ordering discovery in this case.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1996